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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 71 and 73

RIN 3150-AG41

Advance Notification to Native American Tribes of Transportation  
of Certain Types of Nuclear Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking.

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SUMMARY: The Nuclear Regulatory Commission (NRC) is considering an amendment to its regulations that would require NRC licensees to notify Native American Tribes of shipments of certain types of high-level radioactive waste, including spent nuclear fuel, prior to transport to or across the boundary of Tribal lands. Current NRC regulations require advance notification of these shipments to States. In recognition of Tribal sovereignty and the need for Tribes to be informed about activities that occur on Tribal lands, the NRC seeks to extend these regulations to include advance notification of these shipments to Federally recognized Native American Tribes. This advance notice of proposed rulemaking is issued to invite early input from affected parties and the public on the issue of advance notification.

DATES: The comment period expires March 22, 2000. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Mail comments to: The Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemakings and Adjudications Staff.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 am and 4:15 pm on Federal workdays. You may also provide comments via the NRC's interactive rulemaking website (<http://ruleforum.llnl>). This site provides the availability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, (301) 415-5905; e-mail CAG@nrc.gov.

Certain documents related to this rulemaking, including comments received, may be examined at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. These same documents also may be viewed and downloaded electronically via the rulemaking website.

FOR FURTHER INFORMATION CONTACT: Tony DiPalo, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6191, e-mail [AJD@nrc.gov](mailto:AJD@nrc.gov) or Stephanie R. Martz, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-1520, e-mail [SRM1@nrc.gov](mailto:SRM1@nrc.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Current NRC regulations require that licensees inform State governors of certain radioactive waste shipments passing through or cross the boundary of the State. In particular, 10 CFR 71.97 requires advance notification to States of shipments of certain types of radioactive waste and small quantities of irradiated reactor fuel. The types of shipments covered by the Part 71 notification requirements are specified in 10 CFR 71.97(b).

In 10 CFR 73.37, advance notification to States of shipments of certain quantities of irradiated reactor fuel is required. The notification requirements in Part 73 apply to most shipments of irradiated reactor fuel. The types of shipments covered by the Part 73 notification requirements are detailed in 10 CFR 73.37(a). NRC regulations (10 CFR 73.37(g)) require State officials and other individuals to protect schedule information related to these fuel shipments from unauthorized disclosure as specified in 10 CFR 73.21. The NRC was directed to promulgate these regulations by the NRC Authorization Act for Fiscal Year

(i.e., advanced or delayed) relative to the previously furnished information.

The notification for shipments under 10 CFR 73.37(f)(2) must contain the following information:

- (1) The name, address, and telephone number of the shipper, carrier, and receiver;
- (2) A description of the shipment;
- (3) A listing of the routes to be used within the State; and
- (4) A statement that certain information, which is provided as a separate enclosure to the written notification, is required by NRC regulations in 10 CFR 73.21 to be protected as Safeguards Information.

The information to be provided as a separate enclosure to the notification under Part 73 is as follows:

- (1) The estimated date and time of departure from the point of origin of the shipment;
- (2) The estimated date and time of entry into the State;
- (3) For a single shipment whose schedule is not related to the schedule of any subsequent shipment, a statement that schedule information must be protected in accordance with the provisions of 10 CFR 73.21, as Safeguards Information, until at least 10 days after the shipment has entered or originated within the State; and
- (4) For a shipment in a series of shipments whose schedules are related, a statement that schedule information must be protected in accordance with the provisions of 10 CFR 73.21, as Safeguards Information, until at least 10 days after the last shipment in the series has entered or originated within the State, and an estimate of the date on which the last shipment in the series will enter or originate within the State.

To help minimize the possibility for radiological sabotage, schedules and itineraries for shipments of irradiated reactor fuel under Part 73 are required to be protected as Safeguards Information. State officials, State employees, and other responsible parties who receive schedule information are required to protect that information from unauthorized disclosure under 10 CFR 73.21 and 73.37(g). Title 10 of the Code of Federal Regulations, 10 CFR 73.21(a), stipulates that information protection procedures employed by State and local police forces are deemed to meet the information protection measures specified in 10 CFR 73.21(b) through (i). Title 10 of the Code of Federal Regulations, 10 CFR 73.21(c), specifically limits information disclosure except to persons with an established "need to know." For State and local governments, these persons are either the governor, the governor's designated representative, or a member of a State or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies. Title 10 of the Code of Federal Regulations, 10 CFR 73.21(d), prescribes protection required while the information is being used or stored, and 10 CFR 73.21(g) specifies the protection required when the information is transmitted outside an authorized place of use or storage. With respect to the provision of 10 CFR 73.37(f)(4) that the governor's representative be notified in the event of a change in the schedule, NRC policy is that the licensee need notify only a single designated individual within each State (47 FR 600; January 6, 1982).

Further information regarding NRC's transportation requirements can be found in NUREG-0725, "Public Information Circular for Shipments of Irradiated Reactor Fuel," Revision 13, October 1998. Single copies are available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161.

Specific Proposal

The Commission is considering amending Parts 71 and 73 to require that licensees provide timely advance notification to Native American Tribes prior to transport of certain types of nuclear waste, including spent fuel, to or across the boundary of Tribal lands. This amendment would require licensees to provide to the Native American Tribes notification similar to that now required to be provided to the States.

In 1994, the U.S. Department of Energy (DOE) notified the NRC of its intent to implement its Tribal notification policy for DOE's shipments of spent nuclear fuel and high-level radioactive waste. DOE presently accomplishes these shipments under DOE regulations. An amendment to NRC regulations would clarify how DOE, when making shipments under NRC regulations, and NRC licensees would provide notification to Native American Tribes of spent nuclear fuel and high-level radioactive waste shipments that pass to or across the boundary of Tribal lands. Such an amendment would advance NRC's efforts to recognize the sovereignty of Federally recognized Native American Tribes in accordance with President Clinton's 1994 memorandum entitled, ``Government-to-Government Relations with Native American Tribal Governments.'' [59 FR 22951; May 4, 1994] This memorandum states, in part,

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

The President's memorandum does not impose any new obligations on NRC, as an independent regulatory agency, or on other Executive departments and agencies. However, this memorandum encourages Federal agencies, among other things, to consult with Tribal governments, before engaging in activities that may affect Tribes, and to remove any procedural impediments to agencies being able to work directly with Tribal governments.

To accomplish this, the memorandum encourages each Executive department and agency to ``apply the requirements of Executive Order Nos. 12875 (``Enhancing the Intergovernmental Partnership'') and 12866 (``Regulatory Planning and Review'') to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.''

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The primary purpose of the rule contemplated by the Commission would be to inform Native American Tribes of shipments passing to or across the boundary of Tribal lands as a recognition of Tribal sovereignty as well as the need for Tribes to be aware of activities that occur on Tribal lands. While emergency preparedness would not be the main reason for developing such a rule, Tribes that do have emergency preparedness capabilities would benefit from notification.

#### Specific Considerations

Before the NRC prepares a proposed rule on the subject, the NRC is seeking advice and recommendations on this matter from all interested persons. Comments accompanied by supporting reasons are particularly requested on the following questions arranged by topic:

#### A. Developing a List of Native American Tribe Contacts

A.1. In preparing the list of Tribal contacts, the NRC would most likely look to the list of Federally recognized Native American Tribes maintained by the Bureau of Indian Affairs (BIA), U.S. Department of the Interior. Is this an appropriate approach? Are there any other sources that the NRC should consider? (See the BIA website at <http://www.doi.gov/bureau-indian-affairs.html>).

A.2. How can the NRC ensure that contact information is kept current, particularly for smaller Tribes? In maintaining State contacts, the NRC provides each State with the opportunity to update its information annually. Should NRC follow the same approach for Tribal contacts?

A.3. How can licensees effectively and efficiently provide notification to Native American Tribes, particularly smaller Tribes, of a schedule change that would require updated notification by telephone at any time of day?

#### B. Minimizing the Licensees' Administrative Burden

B.1. In what ways can licensees comply with this advance notification requirement, while keeping their administrative burden at a minimum?

B.2. If a shipper is unable to make contact with a Tribe prior to or during a shipment, should the shipment proceed?

#### C. Identifying the Location of Tribes Along Shipment Routes

C.1. How can licensees effectively and comprehensively identify the location of Native American Tribes along a particular vehicle, rail, or vessel shipment route?

C.2. Should DOE and NRC licensees develop and maintain a central data base regarding the location of Tribal lands? Should NRC look to Geographic Information System (GIS) resources to provide licensees with information regarding the location of Tribal lands?

C.3. What types of Tribal lands should the rule apply to (e.g., Trust Lands, Fee Lands (i.e., lands owned by Native Americans but not held in trust by the Federal government), etc.)?

#### D. Safeguards Information

D.1. Should advance notification of spent fuel shipments be provided to any federally recognized Native American Tribe when spent fuel shipments are transported to or across tribal boundaries?

D.2 The NRC's ``need-to-know'' requirement for advance notification of spent fuel shipment information is found in 10 CFR 73.21. Should this requirement be broadened to include other entities, such as Federally recognized Native American Tribes?

D.3. Does wider dissemination of shipment information increase the risk to safeguarding spent fuel shipments (i.e., protecting public health and safety)? How should the NRC address any increase in risk compared with the benefits to be gained from Tribal notification?

D.4. How should the rule address the point of contact for Safeguards Information in the context of Tribal notification?

D.5. A recipient of Safeguards Information must expend resources to ensure the information is handled properly. Are there Tribes who may not wish to be recipients of Safeguards Information?

D.6. If a Tribal government receives Safeguards Information, should the NRC review the Tribe's actions to control and protect Safeguards Information?

D.7. 10 CFR 73.21(a) states that ``information protection procedures employed by State and local police forces are deemed to meet the information protection requirements of Sec. 73.21(b) through (i).'' Should the NRC determine the ability of Tribal governments to protect Safeguards Information and, if so, how?

D.8. Should the contemplated rule include an exemption to the notification requirement if there is reason to believe that a Tribe will not be able to protect the Safeguards Information from disclosure? What basis would the NRC need for granting such an exemption?

D.9. Should 10 CFR 73.37(f) be changed to a permissive form? That is, should the licensee be permitted rather than required to release Safeguards Information to responsible Tribal government officials?

The preliminary views expressed in this notice may change in light of comments received. If the proposed rule is developed by the Commission, there will be another opportunity for additional public comment in connection with that proposed rule.

List of Subjects

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Nuclear materials, Packaging and containers, Reporting and recordkeeping requirements.

10 CFR Part 73

Criminal penalties, Hazardous materials transportation, Exports, Imports, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, and Security measures.

The authority citation for this document is: 42 U.S.C. 2201; 42 U.S.C. 5841.

Dated at Rockville, Maryland, this 14th day of December, 1999.

For the Nuclear Regulatory Commission.  
Annette L. Vietti-Cook,  
Secretary of the Commission.  
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